Supreme Court, U.S.
FILED
SEP 11 2008
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No. 07-1483

In the Supreme Court of the United States

DEBORAH L. PATRICK, Warden, *Petitioner,*

v.

SHIRLEY REE SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Question Presented is whether the Ninth Circuit, on remand from this Court for reconsideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006), again failed to apply the deferential standard for habeas corpus review under 28 U.S.C. § 2254(d) when it granted relief on an insufficient-evidence claim regarding cause of death by accepting the expert testimony of defense experts over the contrary opinions of prosecution experts believed by the jury and found sufficient by the state appellate court. Constitutional sufficiency review is conducted under the deferential "any rational factfinder" standard defined in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). State adjudications of sufficiency claims are also insulated by the additional layer of protection afforded by AEDPA, which precludes federal habeas relief unless the state judgment is an objectively unreasonable application of clearly established Federal law.

In the first decision in this case, the Ninth Circuit panel lost sight of both layers of deference. The state appellate court, after a careful review of the record, rejected the claim of insufficient evidence of cause of death based on its conclusion that this was a case involving a conflict of expert opinion evidence that was for the jury to resolve. The Ninth Circuit re-weighed the evidence and chose to credit the defense experts who were disbelieved by the jury, thus disregarding the deference demanded by *Jackson*. The Ninth Circuit then exacerbated its error by concluding that the state appellate court's finding of sufficient substantial evidence to support the jury's verdict was an objectively unreasonable application of *Jackson* because this was a case of *no* evidence of cause of death rather than a case of conflict of the evidence. This conclusion was

possible only by misapprehending the record and ignoring the additional layer of protection for state judgments mandated by AEDPA. When this Court granted the Warden's first petition for certiorari and remanded the case, it offered the Ninth Circuit an opportunity to re-evaluate its decision in light of *Musladin*. Instead, the Ninth Circuit simply held that *Musladin* had nothing to do with this case, and reinstated its first opinion unchanged.

I.

THE NINTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT IN PLACE OF THE STATE COURTS' IN REJECTING EXPERT OPINION REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL

1. In her brief in opposition to the second petition for certiorari, Smith does not discuss or even cite either *Musladin* or AEDPA. Instead, she repeats her argument that this is not a case involving a conflict of expert opinion at all, and that the Ninth Circuit did not simply substitute its preference for the defense expert opinion on cause of death for the jury's decision crediting the prosecution experts. Smith contends that this a case in which there was *no* evidence to support the opinion of the three prosecution experts that the cause of death was violent shaking. More specifically, Smith asserts that the prosecution experts were unable to identify "*any* medical evidence to support their hypothesis concerning the cause of death," and even contends, incorrectly, that the prosecution experts *agreed* that there was no physical evidence to support their opinions. Opp. 18, 21-22. Most importantly, Smith argues that the three prosecution experts agreed

with the two defense experts that there are only two "medically recognized causes of death in Shaken Baby Syndrome cases," namely "massive bleeding and massive swelling within the skull, both causing downward pressure of the brain into the spinal column which crushes the brainstem." Opp. 21. All of these assertions by Smith are completely belied by the record in this case.

2. All three prosecution expert witnesses testified that Etzell Glass's death was caused by violent shaking. Both Dr. Ehrlich, who conducted the autopsy, and Dr. Carpenter, the autopsy supervisor, testified that death from violent shaking can occur in *three* different ways, not two, as Smith asserts. First, the shaking can cause a massive subdural hemorrhage so that the bleeding will eventually build up enough pressure to damage the brain stem. Second, the shaking can cause massive swelling of the brain, which can result in compression of the brain stem. And, third, the shaking can be violent enough to cause direct trauma to the vital centers of the brain which control the functioning of the heart and breathing, leading to a very rapid death. The prosecution experts all found that the infant died as a result of the third process. RT 692-96; 801; 1273-98; 1476-80.

Two defense experts disagreed with the prosecution expert opinions on the ground that the autopsy did not find the massive swelling or bleeding in the brain characteristic of the first two processes, and offered the opinion that the Shaken Baby Syndrome diagnosis was ruled out by the absence of observable brain stem shearing.

Dr. Carpenter and Dr. Erlich, in turn, disputed the defense theory and testified that the presence of visible brain stem damage was *not essential* to the diagnosis

of death by violent shaking. Even more importantly, however, all of the prosecution experts explained *why* the swelling and bleeding and visible brain stem shearing did not develop in this case: the shaking was so violent that it caused virtually instantaneous death, thus cutting off the infant's circulation. RT 552-53; 576-77; 730-31; 1296-98; 1324. Judge Bea accurately pointed out that the conflict between the experts centered on the dispute over the question of whether "to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?" Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006) (Bea, J., dissenting). The prosecution experts said no. The defense experts said yes. This is a conflict of evidence requiring resolution by a trier of fact. It is not an absence of evidence.

The prosecution experts did not merely present a "hypothesis" concerning the cause of death, however. They pointed to substantial physical evidence supporting their opinion that the death was caused by violent shaking. During the autopsy, Dr. Erlich noted one or two tablespoons of fresh blood on the top of the infant's brain, a fresh blood clot between the hemispheres of his brain, recent hemorrhaging around his optic nerves, a small quantity of fresh subarachnoid blood, and a small bruise and recent abrasion at the lower back part of his head. In combination with the absence of any evidence of hemorrhaging or swelling and the absence of any external injury that might have caused death, these indicators supported Dr. Erlich's conclusion that Etzell Glass was violently shaken, and so violently shaken that he died very quickly. RT 538-42; 710-729.

Dr. Carpenter also used the evidence of recent injury to the brain to substantiate his opinion that violent

shaking was the cause of death. He found that the bleeding at the top of the brain was caused by tearing of the blood vessels in that area. RT 604. He also noted that there was no evidence of any external trauma that could alone have caused this tearing. In the absence of such evidence, and in conjunction with the other evidence of internal injury to the brain, Dr. Carpenter found that the bleeding on top of the infant's brain was caused by violent shaking, resembling "a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore." RT 540.

In addition, Dr. Carpenter explained that the subdural blood, the subarachnoid blood, and the blood around the optic nerves together showed "violent trauma to the head sufficient to cause the death of the infant." He added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Based on these observable findings, Dr. Carpenter testified that shaking caused Etzel's death and that the shaking was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death." RT 604-12.

The prosecution experts also explained that this rapid death resulted in trauma to the brain stem that *could not* be seen because the child's circulation had been shut down. All three prosecution experts testified that some of the effects of the trauma often seen in cases of Shaken Baby Syndrome simply did not have time to develop in this case. In Judge Bea's succinct summary, "the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the

defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions." Pet. App. G; *Smith*, 453 F.3d at 1208.

In short, the state appellate court correctly concluded that this was a case involving a straightforward conflict of expert opinion testimony. There is simply no basis for the view expressed in the opposing brief and in the Ninth Circuit panel opinion that there was *no* evidence of trauma to support the testimony of the prosecution witnesses. The prosecution experts "reached their conclusion [on cause of death] *despite* the lack of visible shearing, not because of it, and explained why." Pet. App. G; *Smith*, 453 F.3d at 1206 (Bea, J., dissenting).

Smith's attempt to argue that this was not a case of conflicting expert opinion as to the cause of death, but rather a case in which the prosecution experts offered *no* objective physical evidence to support their opinion that the cause of death was Shaken Baby Syndrome, thus finds no support in the record. And Smith's assertion that the prosecution experts agreed with the defense experts that death from violent shaking can only occur in two ways, not three, is simply wrong. When the jury chose to believe the prosecution experts, it acted on the basis of substantial evidence.

In addition to the expert testimony, moreover, the prosecution relied on other significant inculpatory evidence, none of which is even mentioned in the opposition brief. As the magistrate judge correctly noted, Smith made several statements that reasonably could be taken as admissions of guilt. Smith was alone with Etzel at the time of his death. She admitted that when she picked him up, his head "flopped back." She also admitted that she shook or "jostled" or "twisted" him when he appeared to be unconscious. In response to questions from a social worker, Smith said, "Oh, my

God. Did I do it? Did I do it? Oh, my God." When Smith's daughter told her, "If it wasn't for you, this wouldn't have happened," Smith did not reply. Combined with the expert testimony, this too is substantial evidence of guilt amply supporting the verdict.

3. The California appellate court, reasonably and correctly, rejected Smith's claim of constitutionally insufficient cause-of-death evidence, finding that the jury resolved the conflict between the experts on the basis of substantial evidence from the prosecution experts, as well as the additional inculpatory circumstantial evidence of respondent Smith's guilt. When the Ninth Circuit disagreed and granted habeas relief, finding the defense theory more plausible because the death did not occur in the "usual manner" of Shaken Baby Syndrome deaths, the panel "stepped over the line dividing the province of the jury from that of the court," as Judge Bea aptly put it. Pet. App. G; *Smith,*, 453 F.3d at 1206. In this manner, the Ninth Circuit panel failed to apply the deferential *Jackson* rule for reviewing the claim of insufficiency of evidence.

II.

THE NINTH CIRCUIT FAILED TO HONOR—AND THE OPPOSITION BRIEF WHOLLY FAILS TO DISCUSS—THE DEFERENTIAL-REVIEW RESTRICTIONS IMPOSED ON THE FEDERAL COURTS BY AEDPA

In addition to its misapplication of the *Jackson* standard, however, the Ninth Circuit failed to review the state court denial of the claim of insufficient evidence of cause of death with the deference required

by AEDPA. Under AEDPA, a federal habeas court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Ninth Circuit failed to recognize or respect this additional layer of protection for the state court adjudication, even after this Court remanded the case for further reconsideration. Smith's opposing brief does not even mention AEDPA, let alone explain how the Ninth Circuit's analysis defers to the state court judgment in any way at all.

The Warden argues in her renewed petition that the Ninth Circuit failed to apply *Musladin's* clear definition of the meaning of deference under § 2254(d). In *Musladin*, this Court reversed the Ninth Circuit's grant of habeas relief because "[n]o holding of this Court" compelled the California Court of Appeal to grant relief on the state prisoner's claim of spectator misconduct. *Musladin*, 127 S. Ct. at 654. In *Schriro* v. *Landrigan*, 127 S. Ct. 1933 (2007), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), the Court reiterated the "clearly established law" principle set forth in *Musladin*, applying it to ineffective-counsel claims. In these two cases, this Court reversed the circuit court's grant of habeas relief because none of its decisions had addressed the specific type of attorney conduct that the prisoner had challenged in state court.

Smith has no response to the Warden's argument that a federal habeas court cannot avoid *Musladin* by declaring, as the Ninth Circuit did here, that *Jackson's* general doctrine of constitutional sufficiency review is "clearly established" law, then using that sweeping general principle as a license to conduct what is in effect a de novo review. The *Jackson* sufficiency

principle is a rule of general application, as is the ineffective-counsel rule of *Strickland* v. *Washington*, 466 U.S. 668 (1984) applied in *Van Patten* and *Landrigan*. *Musladin*, especially when considered in the light of *Van Patten* and *Landrigan*, emphasizes that such general rules require federal habeas courts to accord *more* deference to state court adjudications, not less. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004). The Ninth Circuit opinion in this case turns this principle on its head, proceeding as if a general rule authorizes freer and more intrusive federal review.

It was not "objectively unreasonable" under the "clearly established Federal law" set forth in *Jackson* for the state courts to find that there was a conflict of expert opinion on the cause of death that was resolved by the jury in favor of the prosecution's expert theory on the basis of substantial evidence. Under AEDPA, the Ninth Circuit had no warrant to second-guess this reasonable conclusion, let alone to substitute its own determination of the relative credibility of conflicting expert testimony for the state court jury's decision or the state appellate court's finding that substantial evidence supported the jury's verdict.

The opposition brief simply analyzes and attempts to defend the decision of the Ninth Circuit panel as a proper *de novo* consideration of the sufficiency claim. Although that is, in fact, the way the panel approached the issue, *de novo* review is forbidden by AEDPA. Both the panel and the opposition brief simply disregard AEDPA's stringent limits on the power of federal courts to overturn state judgments. And both the Ninth Circuit panel and the opposition brief fail to come to grips with the implications of the *Musladin* analysis, as required by this Court's remand order. Thus, as in *Van Patten*, this Court's intercession is required.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 11, 2008

Respectfully submitted,

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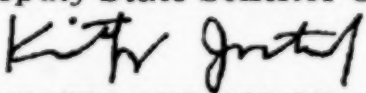

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